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No. 93-1407

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBIN PEARSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 922(*o*), which prohibits possession of most machineguns, and 26 U.S.C. 5861(d), which prohibits possession of, *inter alia*, unregistered silencers, are valid exercises of Congress's powers under the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3.

2. Whether 26 U.S.C. 5861(d), as applied to unregistered silencers, is a valid exercise of Congress's powers under the Taxation Clause of the Constitution, Art. I, § 8, Cl. 1.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 8 F.3d 631.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1993. A petition for rehearing was denied on December 8, 1993. Pet. App. A8. The petition for a writ of certiorari was filed on February 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on four counts of possessing a machine-

gun, in violation of 18 U.S.C. 922(*o*), and on one count of possessing an unregistered silencer, in violation of 26 U.S.C. 5861(d). The district court sentenced him to concurrent terms of 27 months' imprisonment on each count, to be followed by a two-year period of supervised release. The court of appeals affirmed. Pet. App. A1-A3.

1. On June 23, 1992, petitioner's residence was searched by St. Louis police officers and an agent of the Bureau of Alcohol, Tobacco, and Firearms pursuant to a warrant. The law enforcement officers seized numerous weapons and gun parts, including an Uzi carbine, a Heckler & Koch 9mm machinegun, a PWA Commando .223 caliber machinegun, an Uzi machine pistol, and a weapon with a silencer attached. Pet. App. A2; Gov't C.A. Br. 3.

Before trial, petitioner moved to dismiss the indictment on the ground that it failed to allege any nexus between the possession of the machineguns and the silencer charged in the indictment and any enumerated power of Congress. After an evidentiary hearing, a magistrate judge recommended that the motion be denied. The district court adopted the recommendation. Gov't C.A. Br. 2, 5.

2. The court of appeals affirmed. Pet. App. A1-A3. Petitioner argued that the government need prove no nexus with interstate commerce in order to prove that a defendant has possessed a machinegun in violation of 18 U.S.C. 922(*o*), and that Section 922(*o*) therefore is not a valid exercise of Congress's power to regulate interstate commerce. See Pet. App. A2. In *United States* v. *Hale*, 978 F.2d 1016, 1018 (8th Cir. 1992), cert. denied, 113 S. Ct. 1614 (1993), however, the court of appeals had previously rejected petitioner's argument. In *Hale*, the court examined the legislative history of Section 922(*o*) and concluded that Congress had made sufficient findings about the relationship among the proliferation of

machineguns, violent crime, and narcotics trafficking to support a reasonable conclusion that the mere possession of firearms presented a significant threat to the lives and safety of law enforcement officers and the public not limited to the boundaries of a single State. See Pet. App. A2-A3. Relying on *Hale*, the court of appeals therefore determined (Pet. App. A3) that "the enactment of 18 U.S.C. § 922(o) represents a valid exercise of Congress' commerce clause power."

In addition, petitioner had argued that 26 U.S.C. 5861(d) also lay beyond any enumerated power of Congress. See Pet. App. A3. The court of appeals rejected that claim as well, noting that Section 5861(d) had been upheld as a valid exercise of Congress's power to tax, see *United States* v. *Tous*, 461 F.2d 656, 657 (9th Cir. 1972), and as a rational means of maintaining public order, see *United States* v. *Warin*, 530 F.2d 103, 108 (6th Cir.), cert. denied, 426 U.S. 948 (1976). Pet. App. A3.

ARGUMENT

1. Petitioner contends (Pet. 4-20) that 18 U.S.C. 922(*o*) is unconstitutional because it prohibits mere possession of a machinegun, regardless of whether the defendant's possession of the machinegun has any nexus to interstate commerce.

As this Court has explained, a statute enacted under Congress's Commerce Clause power is valid if "Congress had a rational basis for finding that [the regulated activity] affected [interstate] commerce." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 258 (1964); see *Morgan* v. *Secretary of HUD*, 985 F.2d 1451, 1455 (10th Cir. 1993). The Court has rejected the notion that "Congress need make particularized findings in order to legislate." *Perez* v. *United States*, 402 U.S. 146, 156 (1971); see *Katzenbach* v. *McClung*, 379

U.S. 294, 299 (1964) (noting, with regard to the statute at issue in *Heart of Atlanta Motel*, that "no formal findings were made, which of course are not necessary"); see also *United States* v. *Edwards*, 13 F.3d 291, 293 (9th Cir. 1993); *United States* v. *Evans*, 928 F.2d 858, 862 (9th Cir. 1991); *United States* v. *Lane*, 883 F.2d 1484, 1492 (10th Cir. 1989), cert. denied, 493 U.S. 1059 (1990). Thus, Congress may properly regulate a class of activities that affects interstate commerce without proof that any particular intrastate activity within that class has an effect on interstate commerce. *Perez*, 402 U.S. at 152-153; *United States* v. *Hale*, 978 F.2d at 1018. "Where the *class of activities* is regulated, and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez*, 402 U.S. at 154.

The statute at issue here, 18 U.S.C. 922(*o*), regulates the possession of machineguns. The legislative history of Section 922(*o*) shows that in the process of fashioning that statute, Congress considered the relationship between the availability of machineguns, violent crime, and drug trafficking. See H.R. Rep. No. 495, 99th Cong., 2d Sess. 1-5 (1986). When it first enacted the predecessor to Section 922, Congress found facts that showed a nexus between the regulation of firearms and congressional power under the Commerce Clause. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901, 82 Stat. 225-226. The 1986 amendments to Section 922 added subsection (*o*) without significantly modifying Congress's findings on that issue. See Firearms Owners' Protection Act, Pub. L. No. 99-308, §§ 1(a), 102, 100 Stat. 449, 453 (1986); cf. *United States* v. *Edwards*, 13 F.3d at 294 (Congress not required to conduct additional hearings or make new findings that would merely repeat prior findings on detrimental effect of firearms). In light

of the longstanding history of congressional regulation of firearms under the Commerce Clause, the court of appeals correctly concluded (Pet. App. A3) that 18 U.S.C. 922(*o*) is within the constitutional authority of Congress. See *United States* v. *Hale*, 978 F.2d at 1018; *United States* v. *Evans*, 928 F.2d at 862; see also *United States* v. *Edwards*, 13 F.3d at 295.

Petitioner errs when he claims (Pet. 17-20) that the Fifth Circuit's decision in *United States* v. *Lopez*, 2 F.3d 1342, 1368 (1993), cert. granted, No. 93-1260 (Apr. 18, 1994), supports his position. *Lopez* involved a different statute, 18 U.S.C. 922(q) (Supp. IV 1992), which was enacted into law four years after Section 922(*o*), and addressed an entirely different subject, the possession of firearms in a school zone. See 2 F.3d at 1356-1360. Moreover, although the Fifth Circuit in *Lopez* properly declined to express a view on the constitutionality of Section 922(*o*), the court noted that Section 922(*o*) had elements that were "more suggestive of a nexus to or [e]ffect on interstate or foreign commerce" than the statute at issue in that case. 2 F.3d at 1356. In particular, the court explained that Section 922(*o*) bans possession only of "a narrow class of highly destructive, sophisticated weapons that have been either manufactured or imported *after* enactment of [Section 922(*o*)]." 2 F.3d at 1356. Accordingly, the *Lopez* decision, even if it were correct, offers no assistance to petitioner's challenge to Section 922(*o*).[1]

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[1] Petitioner's reliance on cases that predate the 1986 enactment of Section 922(*o*), *e.g.*, *United States* v. *Bass*, 404 U.S. 336, 350 (1971), is misplaced. Such cases had no occasion to consider the constitutionality of Section 922(*o*), its legislative history, or the role it plays in the continuing federal effort to regulate traffic in firearms. Cf. *United States* v. *Edwards*, 13 F.3d at 292-293 (distinguishing *Bass* in context of Section 922(q)).

2. Petitioner briefly raises (Pet. i, 20) the related issue of whether the enactment of 26 U.S.C. 5861(d) represents a valid exercise of congressional power.

As the court of appeals pointed out (Pet. App. A3), "the same general reasons justifying § 922(o) are equally applicable to [Section 5861(d)]." See also *United States* v. *Hale*, 978 F.2d at 1018. The long tradition of federal regulation of firearms activity and Congress's repeated findings regarding the effects of that activity on interstate commerce adequately support Section 5861(d). The statute is a "reasonable regulation for the maintenance of public order," see *United States* v. *Warin*, 530 F.2d at 108; cf. *United States* v. *Huffhines*, 967 F.2d 314, 321 (9th Cir. 1992) (Section 5861(d) requires registration of only those firearms that Congress found to be inherently dangerous and lacking in lawful purpose; possession of silencer shows disregard for law and substantial risk of improper physical force), and is valid under the Commerce Clause.

In addition, Section 5861(d) is a valid exercise of Congress's power "[t]o lay and collect Taxes" under Art. I, § 8, Cl. 1, of the Constitution. This Court long ago upheld the taxation and registration provisions of the National Firearms Act, of which Section 5861(d) is a part, as legitimate exercises of Congress's powers under the Taxation Clause. *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937); see also *Haynes* v. *United States*, 390 U.S. 85, 87 (1968). Section 5861(d) has uniformly been viewed as necessary to assist in the collection of the firearms tax, since "knowing the chain of possession and transfer assists in determining who made the firearm," and thus who is liable for the tax. *United States* v. *Jones*, 976 F.2d 176, 184 (4th Cir. 1992), cert. denied, 113 S. Ct. 2351 (1993); see *United States* v. *Tous*, 461 F.2d at 657 (citing *United States* v. *Giannini*, 455 F.2d 147, 148

(9th Cir. 1972)); *United States* v. *Ridlehuber*, 11 F.3d 516, 526 (5th Cir. 1993).

Petitioner asserts (Pet. 17) that his argument finds support in *United States* v. *Rock Island Armory, Inc.*, 773 F. Supp. 117, 126 (C.D. Ill. 1991). In *Rock Island Armory*, the district court held that Section 5861(d) was unconstitutional as applied to unregistered machineguns whose possession would violate 18 U.S.C. 922(*o*). The reasoning of *Rock Island Armory* was rejected in *United States* v. *Ross*, 9 F.3d 1182, 1194 (7th Cir. 1993), petition for cert. pending, No. 93-7816. In any event, both *Rock Island Armory* and the Tenth Circuit's similar decision in *United States* v. *Dalton*, 960 F.2d 121, 124 (1992), cert. denied, 114 S. Ct. 253 (1993), rested on the ground that Section 5861(d)'s requirements with respect to unregistered machineguns no longer had a revenue-raising purpose after enactment of Section 922(*o*)'s ban on possession of most machineguns. See *Rock Island Armory*, 773 F. Supp. at 125-126; *Dalton*, 960 F.2d at 124-125. Neither case supports petitioner's argument that Section 5861(d)'s requirements with respect to *silencers*—which are not affected by Section 922(*o*)—are beyond Congress's powers under the Taxation Clause. Indeed, the Tenth Circuit has held that, notwithstanding its decision in *Dalton*, Section 5861(d) may validly be applied to firearms that are unaffected by Section 922(*o*)'s proscription. See *United States* v. *Staples*, 971 F.2d 608, 610 (10th Cir. 1992) (holding that Section 5861(d) may validly be applied to machineguns manufactured before Section 922(*o*) was enacted).[2]

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[2] *Staples* is currently pending before this Court on another issue. *Staples* v. *United States*, No. 92-1441 (argued Nov. 30, 1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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